

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RONDA S. EISENBARGER**

Claimant

VS.

**K-MART CORPORATION**

Respondent

AND

**INDEMNITY INSURANCE COMPANY OF  
NORTH AMERICA**

Insurance Carrier

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Docket No. 1,042,224

**ORDER**

Respondent appeals the July 1, 2009, Award of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded benefits for a 10 percent permanent partial whole body functional impairment, followed by a 45 percent permanent partial general (work) disability based upon a wage loss of 47 percent and a task loss of 43 percent.

Claimant appeared by her attorney, James L. Wisler of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at oral argument to the Board, the parties stipulated that the 10 percent whole body functional impairment adopted by the ALJ in the Award was proper and may be used in the Board's calculation of this award. The parties also stipulated that the 43 percent task loss opinion of Harold A. Hess, M.D., was the only task loss opinion in this record and can also be used by the Board in the calculation of this award. Finally, the parties agreed that the method of paying the award used by the ALJ, whereby claimant would be paid both temporary total disability compensation and permanent partial disability compensation during the same weeks, violated K.S.A. 44-510e. The method of computing the Award will be adjusted accordingly. The Board heard oral argument on October 21, 2009.

### ISSUE

What is the nature and extent of claimant's injuries and disability? Pursuant to the stipulations of the parties, the only remaining issue is what wage loss claimant suffered when comparing claimant's post-injury earnings to the stipulated average weekly wage of \$738.03. Respondent argues that the appropriate wage should be \$650.00 per week. Claimant argues that the determination by the ALJ that claimant was earning \$390.00 per week should be affirmed.

### FINDINGS OF FACT

Claimant began working for respondent in its warehouse in 1989. On June 20, 2007, claimant injured her back while pulling a box, containing a kitchen table and chairs, from off of a shelf onto a pallet. Claimant reported the injury to her supervisor and was referred for medical treatment. Claimant was placed on light duty until she left work on March 3, 2008, to undergo surgery under the care of board certified neurosurgeon Harold A. Hess, M.D. Claimant has not returned to work for respondent. However, at the time of the regular hearing, and as agreed at oral argument to the Board, claimant continues to receive fringe benefits through respondent in the form of health insurance and dental insurance. If and when claimant stops receiving fringe benefits, the average weekly wage will increase to \$813.00.

Claimant was first examined by Dr. Hess on September 20, 2007. Claimant underwent two epidural injections and a lumbar myelogram, followed by a CAT scan. Claimant was diagnosed with a broad-based disk protrusion and spinal stenosis at L4-5. The epidural injections brought no relief from claimant's pain. Surgery was discussed and, on March 3, 2008, claimant underwent a decompressive lumbar laminectomy at L4 and L5. Claimant was found to be at maximum medical improvement (MMI) on September 12, 2008, and released from Dr. Hess's care on October 8, 2008. Dr. Hess ordered a functional capacity evaluation (FCE), and it was determined that claimant was functioning in the light demand level as defined by the U.S. Department of Labor. Claimant was rated at 10 percent to the whole person pursuant to the fourth edition of the *AMA Guides*.<sup>1</sup> In reviewing a task list created by vocational expert Dick Santner, Dr. Hess determined that claimant had suffered a 43 percent loss of task performing ability. Both Dr. Hess's functional rating and his task loss opinion have been stipulated to by the parties and will be utilized in the determination of claimant's final disability.

After the surgery, claimant was not offered employment by respondent. In October or November 2008, claimant began advertising for a daycare facility in her home. The

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

appropriate licenses were obtained, and claimant got her first group of children on December 30, 2008. At one point, claimant had five full-time children and one part-time child. But at the time of the regular hearing, claimant only had three full-time children and one part-time child. Claimant testified that her gross income at that time was \$390.00 per week. When claimant had five full-time children, her gross income was \$650.00 per week. At the time of the oral argument to the Board, claimant's attorney argued that her average weekly wage should be \$390.00 per week as determined by the ALJ. Respondent argued that the \$650.00 gross income should be accepted as a more accurate representation of claimant's actual wage earning ability. Claimant's testimony at the regular hearing identified possible expenses associated with the running of the daycare facility. However, the ALJ determined that the testimony was varied and unreliable and no deductions were taken for any of the alleged expenses. The ALJ adopted the \$390.00 figure as the appropriate post-injury wage. At oral argument to the Board, no argument was presented by either attorney regarding the alleged expenses.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>4</sup>

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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<sup>2</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 2006 Supp. 44-501(a).

earning at the time of the injury and the average weekly wage the worker is earning after the injury.<sup>5</sup>

The parties have stipulated to claimant's functional impairment and task loss as noted above. The only issue remaining for the Board's consideration is what, if any, wage loss claimant has suffered as the result of the June 20, 2007, accident and resulting injuries. Until recently, the wage loss component of K.S.A. 44-510e had been interpreted pursuant to *Foulk*<sup>6</sup> and *Copeland*.<sup>7</sup>

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk* and *Copeland*. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>8</sup>

However, in the recent case of *Bergstrom*,<sup>9</sup> the Kansas Supreme Court determined that the statute must be given the effect that its express language intends. The Court stated that K.S.A. 44-510e contained no language requiring a worker to make a good-faith

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<sup>5</sup> K.S.A. 44-510e.

<sup>6</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>7</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>8</sup> *Id.* at 320.

<sup>9</sup> *Bergstrom v. Spears Manufacturing Company*, \_\_\_ Kan. \_\_\_, 214 P.3d 676 (2009).

effort to seek out and accept alternate employment. The statute placed a limitation on permanent partial disability compensation when the employee,

. . . is *engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)<sup>10</sup>

The legislature did not state that the employee is required to attempt to work or that the employee is capable of engaging in work for wages equal to 90 percent or more of the preinjury average gross weekly wage.<sup>11</sup> The Court went on to disapprove all cases that imposed a good-faith effort requirement on injured workers.<sup>12</sup>

Here, claimant worked at a comparable wage from the date of accident until she left work to undergo surgery on March 3, 2008. Claimant is limited to her functional impairment of 10 percent for that time period. After claimant left work on March 2, 2008, she became eligible for temporary total disability followed by a permanent partial general disability award based on her stipulated task loss of 43 percent, averaged with her actual wage loss calculation. Here, claimant was paid temporary total disability compensation for 31.86 weeks after the surgery. When claimant was released by Dr. Hess, the right to the permanent disability award began. The 31.86 weeks of temporary total disability compensation started March 3, and would end on October 11, 2008. Claimant's permanent partial general disability, thus, became effective on October 12, 2008.

Claimant testified that she applied for a daycare license in October 2008, but from October 12, 2008, to January 1, 2009, claimant had no income. Therefore, her wage loss during this time would be 100 percent. Effective January 1, 2009, claimant began running the daycare center in her home. Claimant's gross income from the daycare program has varied over the weeks between the start of the daycare program and the regular hearing. Claimant's highest gross income was at \$650.00. Her lowest was \$390.00. The \$390.00 "wage" was effective at the time of the regular hearing. The exact dates of these gross earnings variations are not contained in this record. However, with the current method of calculating disability awards, the variations in this claimant's wage loss would result in no alteration of the final award.

Here, claimant was earning \$390.00 at the time of the regular hearing. This results in an earning loss of 47 percent. When averaged with the task loss of 43 percent, the resulting permanent partial general disability is 45 percent. This is the same award

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<sup>10</sup> K.S.A. 44-510e(a).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

determined by the ALJ in the Award. That permanent partial disability award is herein affirmed. However, the stipulation of the parties regarding the method of paying the award will alter the speed at which the money is paid.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to claimant's functional disability of 10 percent and claimant's permanent partial general disability award of 45 percent, but modified to avoid duplication or overlapping payments of the temporary total disability and permanent partial disability compensation.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated July 1, 2009, should be, and is hereby, modified to award claimant temporary total disability and permanent partial disability during separate weeks, but affirmed in all other regards.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Ronda S. Eisenbarger, and against the respondent, K-Mart Corporation, and its insurance carrier, Indemnity Insurance Company of North America, for an accidental injury which occurred on June 20, 2007, and based upon an average weekly wage of \$738.03.

Claimant is entitled to 36.57 weeks of permanent partial disability compensation at the rate of \$483.00 per week for a 10 percent whole body functional impairment totaling \$17,663.31, followed by 31.86 weeks of temporary total disability compensation at the rate of \$483.00 per week totaling \$15,388.38, followed by 138.61 weeks of permanent partial general disability compensation at the rate of \$483.00 per week for a 45 percent permanent partial general disability, for a total award not to exceed the maximum statutory award of \$100,000.00, for a 45 percent permanent partial general disability.

As of October 28, 2009, there is due and owing claimant 36.57 weeks of permanent partial disability compensation at the rate of \$483.00 per week for a 10 percent whole body functional impairment totaling \$17,663.31, followed by 31.86 weeks of temporary total disability compensation at the rate of \$483.00 per week totaling \$15,388.38, followed by 54.57 weeks of permanent partial disability compensation at the rate of \$483.00 per week totaling \$26,357.31, for a total of \$59,409.00, which is ordered paid in one lump sum less

any amounts previously paid. The remaining balance of \$40,591.00 is to be paid for 84.04 weeks at the rate of \$483.00 per week, until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James L. Wisler, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge